IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 1632 of 1988

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

POPATBHAI HARJIBHAI PATEL. & 1 - Appellant(s)
Versus
BIRBAL RAMNATH PATEL & 1 - Defendant(s)

==========

Appearance :
MR MB GANDHI for Appellant(s) : 1 - 2.
None for Defendant(s) : 1 - 2.

==========

CORAM : HONOURABLE MR.JUSTICE M.R. SHAH
Date : 19/07/2006

ORAL JUDGMENT

By way of this Appeal, the appellants herein, original-plaintiffs have challenged the judgment and decree passed by the learned City Civil Court at Ahmedabad dated 24th June 1988 in

Civil Suit No. 4516 of 1982 in dismissing the same. The plaintiffs filed the Civil Suit No. 4516 of 1982 before the learned Judge, City Civil Court at Ahmedabad for possession of tenement bearing No. A/42 situated at Jagatnagar, Bapunagar, Ahmedabad, along with mesne profits at the rate of Rs. 250/- from the defendants alleging inter alia that the defendants have occupied the same as trespassers. Plaintiff No.2 is a registered partnership and plaintiff No.1 is a partner thereof. The firm was dealing in construction of buildings and it is averred in the Plaint that the constructed premises are given to different members after execution of Banakhat, possession of premises was given to the members, and sale deed was executed only on obtaining requisite permission of the Government. It was the case of the plaintiffs that the partnership firm constructed one Jagatnagar society in Bapunagar and original-defendant No.1 (who subsequently died) Saraswatiben objected for

the membership of the said society for a tenement admeasuring 54 sq.yds. As she had no sufficient funds for buying the same, she had opted for bungalow No.55, she was given receipt bearing No. 37 dated 18.12.1978 and was given possession of the said tenement on 24.12.1978. As there was outstanding towards the said bungalow No.55 which was recoverable from the 1st defendant's daughter, the 1st defendant started raising objection regarding completion of work of bungalow No.55. The original-defendant No.1 started residing at his bungalow No.55. After 18.11.1979 the original-defendant No.1 started creating false evidence to show that he has occupied in his own individual and ownership rights and tenement bearing No. A-42 and on or about 14/15th December 1979 the original-defendant No.1 illegally occupied the said tenement No. A.42 which was adjacent to bungalow No. 55 occupied by his daughter. As soon as the plaintiffs came to know about it they persuaded him to vacate from there

but in the meantime the original-defendant No.5 filed Civil Suit No. 4595 of 1979 in the Court of Small Causes at Ahmedabad and brought injunction restraining the plaintiffs from illegally dispossessing him from the said tenement No. A.42. A Standard Rent Application and a Criminal Complaint against the plaintiffs were also filed in the Court of Metropolitan Magistrate, Ahmedabad. It was stated in the Plaint that the criminal court acquitted the plaintiffs as it was found that original-defendant No.1 was not the tenant. Inspite of that the original-defendant No.1 continued in possession of the said property upto 31.12.1980 and thereafter he gave possession thereof to the defendant No.2 and the defendant No.1 started staying elsewhere. However he was collecting monthly rental of Rs. 250 from the defendant No.2 and therefore the plaintiffs filed the aforesaid Suit.

2. The suit was resisted by the defendants. A joint written statement was filed at Exh.18. Thereafter, the suit was amended and further written statement to the amended Plaint was also filed. It was submitted on behalf of the defendants that they were in legal occupation and possession of tenement No. A-42 and if they have a protective title thereto. It was also further contended by him that proceedings are pending before the Court of Small Causes at Ahmedabad to determine his protective title as a tenant in the suit premises. It was also submitted that defendant No.2 was the nephew of defendant No.1 and defendant No.1 being very old was staying with him and was not giving any rent as alleged by the plaintiffs. It was further submitted that they have nothing to do with tenement No.55. Considering the controversy raised by the parties, the learned trial Court framed Issues at Exh.40, and one of the Issues was whether the plaintiffs prove that they as owner of the suit

property are entitled to recover possession of the property from the defendants No. 1 and 2 as they are holding the same as trespassers in the suit property. Another Issue was whether the defendants No. 1 and 2 prove that as they are enjoying protective title to the suit property there was no cause of action which has arisen against them entitling the plaintiffs to recover possession of the suit property from them. Plaintiff No.1 was examined at Exh. 43. Defendant No.2 was examined at Exh.52. Documentary evidences were at Exhs. 44, 45, 46, 47, 56,57 on behalf of the plaintiffs and the documentary evidences of the defendant No.2 were at Exhs. 53 and 54. After considering the oral as well as documentary evidences adduced by the parties in respect of the rival contentions the learned trial Court held that as the plaintiffs have not proved their ownership rights and as the Jagatnagar Society is not even registered, no suit can be filed claiming possession of the

property as it is the owner who is entitled to ask such a relief, and the plaintiffs are not entitled to claim possession and accordingly the learned trial Court dismissed the suit. However, the learned trial Court also held that possession which the defendant enjoys was not referable to any valid title or right so as to claim any exemption from the liability or consequences which the plaintiffs are in a position to prove their ownership of the suit property, in which case the defendant No.2 would be required to hand over possession of the premises to the plaintiffs. Being aggrieved and dissatisfied with the judgment and decree passed by the trial court in dismissing the suit the appellants original-defendants have preferred the present First Appeal.

3. Shri Chinmay Gandhi, learned counsel appearing on behalf of the respondents has submitted that the learned trial Court though

rejected the documents at Exhs. 53 and 54 by which the defendants have claimed the tenancy, has materially erred in dismissing the suit. It is also further submitted that the learned trial Court failed to consider that admittedly the defendant No.1 had no title to the property and if the tenancy is not proved or if any interest in the property is not established then such person is a trespasser and cannot be protected under any circumstance. It is further submitted that when title to the property of the appellants was not challenged the question of producing the proof for proving ownership does not arise and therefore the learned trial Court has materially erred in dismissing the suit. It is further submitted that when admittedly the defendants were trespassers qua constructed property for which eviction was sought the question of proving the title to the land does not arise and therefore it is requested to allow the present Appeal. It is required to be noted that the

appellants herein original-plaintiffs filed the suit for possession of bungalow No.A-42 situated in Jagatnagar-Bapunagar. On consideration of the partnership deed the learned Judge found that the partnership firm had only Banakhat rights over the land bearing Survey No. 106/1/2 over which the proposed society, i.e., Jagatnagar Society tenements were to be constructed by the appellant No.2, i.e., plaintiff No.2. The learned Judge also observed that the said society was only a proposed society and not a registered one and till the partnership deed was executed, no absolute ownership rights were transferred to the plaintiff firm. On appreciation of evidence, the learned Judge found that the rights the partnership firm acquired were only Banakhat rights over the land and not any absolute ownership rights thereof. For the purpose of getting possession as rightly observed by the learned trial Court the plaintiffs were required to first prove their ownership rights over the

property and whether the proposed Jagatnagar Society had ever been registered to give it a legal entity and title. On going through the judgment as well as the documentary evidences and the Record and Proceedings, it appears to the Court that the learned trial Court was justified in giving the finding that the appellants-original-plaintiffs have failed to prove their ownership over the society and the said bungalow, and once the plaintiffs have failed to establish their ownership rights over the bungalow of which the possession was sought, no decree in favour of the plaintiffs to hand over possession be passed. However if it is held by the learned trial Court that the defendants have no right and/or they do not have any title over the said bungalow, still for the purpose of decree in favour of the plaintiffs who had sought for possession, the plaintiffs are required to first establish their ownership rights over the bungalow, which the plaintiffs have failed to

establish. This Court is in complete agreement with the findings and reasonings of the learned trial Court so far as Issue No.1 is concerned, i.e., the plaintiffs have failed to establish their ownership rights over the bungalow of which possession was sought. Under the circumstances, no decree in favour of the appellants can be passed.

4. For the reasons stated above, the Appeal fails and it shall stand dismissed accordingly. No costs.

[M.R. Shah, J.]

RMR.